IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 26, 2006 Session

ANTONIO M. GRANDA, M.D. v. DANIEL D. WARLICK

Appeal from the Circuit Court for Davidson County
No. 02C-2184 Tom E. Gray, Chancellor

No. M2005-01248-COA-R3-CV - Filed on October 27, 2006

Plaintiff appeals the denial of his Motion for New Trial contending the jury improperly conducted its own experiments with the evidence. The trial court denied Plaintiff's motion finding that the jury's examination of a laser pointer, which had been admitted into evidence, amounted to nothing more than the jury closely examining the evidence. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Larry L. Crain, Brentwood, Tennessee, for the appellant, Antonia M. Granda, M.D.

Gary A. Brewer and Steven J. Meisner, Nashville, Tennessee, for the appellee, Daniel D. Warlick.

OPINION

In 2003, attorney Daniel Warlick represented a party in a malpractice action against Dr. Antonia Granda, a gastroenterologist practicing in Nashville, Tennessee. During the trial, Warlick used a laser pointer to motion to a chart being used in a witness' testimony. In using the laser pointer, Warlick allegedly pointed it in Granda's eye, damaging his retina and causing permanent injury.

Granda filed this action against Warlick claiming that Warlick was negligent and liable for battery. At trial, both parties provided expert testimony concerning eye injuries that could be caused by laser pointers. Granda offered expert testimony from Dr. Spencer Sherman who had examined and treated Granda. Dr. Sherman testified that Granda had sustained a lesion to his eye that impaired his peripheral vision. Dr. Sherman explained a series of tests he conducted, which led him to the conclusion that the laser pointer caused the lesion that he found on Granda's retina.

Warlick presented two expert witnesses. They explained the means by which a laser pointer could injure a retina and the type of retinal injury that could be caused by a laser pointer; however, after examining the injury to Granda's retina, they concluded his injury was not consistent with the type of injury caused by laser pointers.[1] Warlick also introduced evidence that Granda had several pre-existing conditions affecting his eyes, including macular degeneration, retinal drusens, and glaucoma.[2] Based upon this evidence, Warlick's expert witnesses concluded the injury to Granda's eye was the result of a pre-existing medical condition, not the laser pointer.

The laser pointer used by Warlick in the medical malpractice action was introduced into evidence in this action and repeatedly referred to and discussed by the witnesses and counsel for both parties. During the jury deliberations, the jury requested that the laser pointer, which was introduced into evidence and marked as an exhibit, be brought to them in the jury room. Shortly after the laser pointer was delivered to the jury, the jury returned a verdict in favor of Warlick finding that Warlick did not intentionally, recklessly, or negligently use the laser pointer.

Soon after the trial, Granda learned from one of the jurors that some of the jurors used the laser pointer to "test" the amount of heat emanating from the laser by pointing it to their hand or arm. Granda obtained an affidavit from that juror, which he used as the basis for his motion for a new trial, contending the testing of the laser pointer by shining it on their hands and arms constituted jury misconduct.

The trial court denied Granda's Motion for New Trial, and this appeal followed.

ANALYSIS

The motion for a new trial is based on one juror's affidavit, which is very brief. In pertinent part, the juror states:

> [d]uring deliberations, the jury requested that the laser pointer be brought back to the jury room. The reason for this request was so that we could examine the pointer and test it to see whether there was sufficient heat from the device to cause a burn. During our deliberations we passed the laser pointer around and some of the jurors conducted a test of the device by shining it onto their hand or arm.

The validity of a jury's verdict may not be challenged by post-verdict testimony of a juror concerning jury deliberations unless the evidence upon which the challenge is based satisfies one of the three exceptions stated in Tenn. R. Evid. 606(b). *See Schwartz v. Lookout Mountain Caverns, Inc.*, No. E1999-01142-COA-R9-CV, 2000 WL 555058, * 2 (Tenn. Ct. App. May 8, 2000); *Patton*

[1] Their examination was comprised of a review of his medical records and pictures of his retina.

[2] Macular degeneration causes progressive damage to the tissue beneath the retina that can scorch the retina and impair its ability to recycle. Retinal drusens is a condition that leads to the build up of calcium deposits in the eye, and glaucoma causes mild peripheral vision loss.

v. Rose, 892 S.W.2d 410, 414 (Tenn. Ct. App. 1994); *Caldarado v. Vanderbilt Univ.*, 794 S.W.2d 738, 741-42 (Tenn. Ct. App. 1990). The rule states:

> Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotion as influencing that juror to assent to or dissent from the verdict or indictment or concerning the jury's mental processes, *except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention*, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Tenn. R. Evid. 606(b) (emphasis added). The exception at issue is whether extraneous prejudicial information was improperly brought to the jury's attention. Extraneous information is information that comes from a source outside of the jury. *Caldarado*, 794 S.W.2d at 742 (citing *State v. Corker*, 746 S.W.2d 167, 171 (Tenn. 1987)). Extraneous information that could warrant a new trial if found to be prejudicial includes "consideration of facts not admitted in evidence." *Caldarado*, 794 S.W.2d at 742 (citing *Gov't of Virgin Islands v. Gereau*, 523 F.2d 140, 149-150 (3d Cir. 1975), *cert. denied*, 424 U.S. 917, 96 S.Ct. 1119, 47 L.Ed.2d 323 (1976)).

Granda contends he is entitled to a new trial because some of the jurors conducted a "test" with the laser pointer, which constituted the consideration of facts that were not admitted into evidence. This is not the first case wherein a party has complained that a juror's closer experimentation of an exhibit that was admitted into evidence constituted misconduct. A not dissimilar occurrence was analyzed in *Gibson v. Chrysler Corp.*, No.W2002-03134-COA-R3-CV, 2004 WL 1918725 (Tenn. Ct. App. Aug. 26, 2004).[3] The Gibsons contended that the material evidence on which the jury based its verdict was the result of the jury's improper experimentation and testing with the car seat during deliberations, which resulted in "prejudicial and extraneous information [being] gathered during improper, unsupervised experimentation and testing performed by the jury with a doll positioned in the seat." *Id.* at * 3.

In *Gibson*, we concluded that although a juror may not "conduct experiments which have the effect of putting them in possession of evidence not offered at trial," this principle did not prevent a juror from conducting a closer, analytical examination of an exhibit that was properly admitted into evidence and delivered to the jury during their deliberations. Finding the examination of the car seat by the jury did not constitute extraneous evidence, we commented:

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[3] As the basis for their assertion, the Gibsons submitted the affidavit of one juror which stated, in part: "During the jury deliberations, the jurors . . . took turns experimenting with the integrated child safety seat from the Gibson van and the doll to determine whether the seat was capable of choking a child." *Gibson*, 2004 WL 1918725, at *3.

> In this regard, experiments of jurors which lead to the jury's consideration of extrinsic evidence are constitutionally impermissible. However, *experiments by the jurors as part of their deliberative processes which do not involve the receipt of evidence out of court are permissible,* and the conducting of experiments in the jury room which merely duplicate what has occurred during trial in the courtroom, does not constitute reception of new evidence by the jury in this regard. Furthermore, *where a test or experiment conducted by the jury in the jury room amounts to a closer, more analytical examination of evidence which was properly introduced at trial, as opposed to the introduction of new evidence, it is not improper*.

Gibson, 2004 WL 1918725, at *4 (citing 75B Am.Jur.2d, *Trial*, § 1556)(emphasis added).

The affidavit Granda relies on provides significantly less insight into the jury's examination of the exhibit than that in *Gibson*. We find it significant that the affidavit fails to indicate that any juror commented on his or her opinion of the results of the alleged experiment. Moreover, the affidavit does not state what influence, if any, the alleged experimentation had on any juror's decision. Consequently, there is no evidence to support Granda's contention that any juror came into possession of extraneous prejudicial information. Since the affidavit failed to establish that extraneous prejudicial information was improperly brought to the jury's attention, the affidavit does not contain competent evidence to justify an inquiry into the validity of the jury's verdict. *Schwartz*, 2000 WL 555058, * 2; *Patton*, 892 S.W.2d at 414; *Caldarado*, 794 S.W.2d at 742 (holding in order to consider whether the jury engaged in improper conduct, the court must first determine whether the information contained in the juror's affidavit submitted is competent evidence).

Having found the testimony of the one juror, which is the only evidence upon which Granda relies, to be incompetent pursuant to Tenn. R. Evid. 606(b), which renders the affidavit inadmissible, there is no evidence in the record to support the contention of jury misconduct.

We therefore affirm the trial court's denial of Granda's Motion for New Trial and remand with costs of appeal assessed against the appellant, Antonio M. Granda, M.D.

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FRANK G. CLEMENT, JR., JUDGE